

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
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In the Matter of )

1998 Biennial Regulatory Review -- )  
Streamlining of Mass Media )  
Applications, Rules and Processes )

MM Docket No. 98-43

Policies and Rules Regarding )  
Minority and Female Ownership of )  
Mass Media Facilities )

MM Docket No. 94-149

To: The Commission

**PETITION FOR PARTIAL RECONSIDERATION**

The Federal Communications Bar Association ("FCBA")<sup>1/</sup>,  
pursuant to Section 1.429 of the Commission's rules, hereby seeks  
partial reconsideration of the Commission's action in the Report  
and Order, 63 Fed. Reg. 70040, published December 18, 1998, in  
this proceeding. In the Report and Order, the Commission adopted

<sup>1/</sup> The FCBA is a non-profit, non-stock corporation organized under the laws of the District of Columbia, and has been in existence since 1936. The FCBA's membership consists of over 3,100 attorneys and other professionals involved in the development, interpretation and practice of communications law and policy. This Petition for Partial Reconsideration was prepared by an appointed sub-committee of the Mass Media Practice Committee, and approved by the FCBA's Executive Committee, its elected board of directors. As in the case of other filings on behalf of the FCBA, the views expressed in this Petition for Partial Reconsideration do not necessarily reflect the views of each and every FCBA member. No FCBA members who are employees of the FCC participated in the preparation of this filing. In addition, one member of the Executive Committee, who is an employee of the FCC, did not participate in the Committee's discussion or consideration of this Petition for Partial Reconsideration or in the vote to authorize its filing.

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a number of innovative and exciting proposals which promise to greatly expedite application processing in the future. The FCBA takes issue with and seeks reconsideration on only two aspects of the Commission's new rules and procedures. The first is an issue addressed in the Joint Statement of Commissioner Susan Ness and Commissioner Gloria Tristani -- the failure of the Commission to require applicants to file application worksheets in an applicant's local public file and in the Commission's reference room, and to identify the persons responsible for completing the worksheets along with the date the worksheets were completed.<sup>2/</sup> The second is the substance of the worksheet questions to the extent that the worksheet questions prejudge the outcome of the multiple ownership rule making proceedings. In support of reconsideration, the following is submitted:

**Retention and Filing of Application Worksheets**

1. The Commission need only refer back to its experience a few years ago to understand why the FCBA is strongly believes that applicants should retain worksheets, and make those worksheets available for public inspection in the applicant's local public file and in the Commission's reference room. Some 19 years ago in 1981, the Commission adopted a raw financial certification procedure for applicants for new broadcast facili-

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<sup>2/</sup> Commissioner Ness and Commissioner Tristani observed that the failure of the Commission to require the worksheets to be made available for public inspection "is contrary to the informed judgment of the Federal Communications Bar Association". See Joint Statement, released November 25, 1998.

ties.<sup>3/</sup> Under the procedure adopted in 1981, an applicant was merely required to certify its financial qualifications by placing a mark in the "yes" box on the application form.

2. Eight years later, however, in Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301), 4 FCC Rcd 3853, 3858 (1989), the Commission stated that:

After a number of years of experience with this certification procedure, we recognize it has led to an increase in applications filed by entities that were financially unqualified at the time of filing.

The Commission recounted that in a 1987 Public Notice [Certification of Financial Qualifications, 62 RR 2d 638, 639 (1987)], it noted that:

Such false certifications . . . waste the resources of both the Commission and legitimately qualified applicants. As a consequence, the public may receive delayed service, substandard service, or no service at all.

The Commission went on to point out that even though it had initiated a program of random checks of financial qualifications, that program did not sufficiently deter applicants from falsely certifying financial qualifications (4 FCC Rcd at 3858-59). Therefore, in 1989 the Commission required applicants to begin submitting additional financial information on their FCC Form 301 applications.<sup>4/</sup>

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<sup>3/</sup> See Revision of Form 301, 50 RR 2d 381 (1981).

<sup>4/</sup> The Commission stated that the benefits of requiring  
(continued...)

3. Now 10 years later, the Commission is proposing to accept similar raw certifications on application forms for new broadcast stations, and for assignments of licenses and transfers of control of licensee corporations. The public interest considerations involved today are no less important than were present in 1989. As the Commission held in 1989 and as Commissioners Ness and Tristani noted in their Joint Statement, raw certifications simply do not allow the public or the Commission to evaluate the basis for certifications. The basis for the certifications for the new application forms, if available at all in written form, is available only in the worksheets. If the worksheets are not readily available, the public will not have "the tools to augment [the Commission's] own limited enforcement resources". See Joint Statement of Commissioners Ness and Tristani.

4. In order to complete applications under the new rules and procedures, the Commission is requiring each applicant to complete the worksheets to the application forms. The application form specifically asks an applicant to certify that it has answered each question in the application based on its review of

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<sup>4/</sup> (...continued)  
additional financial information were numerous. It noted that the information ensures that unqualified applicants do not evade review. Further, it pointed out that the additional information permits the Commission, as well as other parties, to make attempts to independently verify the certification. The Commission noted that the new requirements imposed a small additional burden on applicants. But the Commission believed that the additional burden was outweighed by significant public interest benefits. See 4 FCC Rcd at 3858-59.

the application instructions and worksheets.<sup>5/</sup> If applicants must fill out the worksheets, it is a minimal additional burden on the applicant to place a copy of completed worksheets in the applicant's local public file and to file a copy of the worksheet in the Commission's public reference room utilizing the same procedure as with sales agreements and contracts adopted in the Report and Order.

5. The FCBA fears that the Commission, in its concern for reducing burdens on applicants, is unwisely increasing the burden on the Commission and the public to ensure the integrity of applications before it. The FCBA stated in its comments in this proceeding that "[t]he integrity of the Commission's processes will depend upon the accurate and studied use of the proposed worksheets by applicants". FCBA Comments at par. 22. It is far better for applicants to maintain and file worksheets that have already been completed, than it is for the Commission to have its application process abused by applicants submitting false or erroneous certifications.

6. Importantly, for example, the Commission is not requiring any underlying data to be maintained supporting contour maps and the certification that a proposed multiple station acquisition will comply with the Commission's complex ownership rules. The calculations to confirm compliance with these rules can often

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<sup>5/</sup> See FCC Form 301, Section II, Question 1; FCC Form 314, Section II, Question 1 and Section III, Question 1; and FCC Form 315, Section II, Question 1, Section III, Question 1, and Section IV, Question 1.

be the subject of disagreement even among reputable engineers and legal counsel. The practical effect of not having underlying supporting material available to the public may be to increase the Commission's workload rather than decrease it. Competitors in a particular market where there is a question as to whether the local ownership rules are complied with will have no recourse but to file a petition to deny if it appears that a certification of ownership compliance was improvidently made. Yet, if the worksheets could be consulted, that competitor might have been persuaded, prior to filing a petition, that the certification was indeed justified. This unintended effect of increasing the number of petitions to deny filed against transactions strongly militates against shielding an applicant's worksheets from public review, particularly when the Commission is still considering the practical application of many of its ownership rules and policies.

7. Contrary to the conclusions reached in Paragraph 24 of the Report and Order, the filing of worksheets will not be an additional burden on the Commission. The Commission in its routine application processing need not concern itself with anything other than the raw certifications. The worksheets underlying the certifications, however, should be available to the public and to the Commission in the event questions are raised. Absent reconsideration, it is unlikely that most applicants will voluntarily retain worksheets, especially when the Report and Order tells them that they "need not retain them".

The integrity of the Commission's processes will benefit from applicants maintaining the worksheets and making them available in applicants' public files and in the Commission's reference room. Through this procedure, the Commission can avoid making the same miscalculation it made in 1981 when it adopted the raw financial certification box on the application form, only to backtrack in 1989 after eight years of experience with false certifications.

#### **Substance of Worksheet Questions**

8. The FCBA is concerned about a number of the questions concerning cross-interests, familial relationships and investor and creditor disclosures which are contained in the worksheets attached to the Report and Order. The new questions raise issues as to whether the FCC is prejudging the outcome of the multiple ownership rule making proceedings which are now pending. Moreover, the FCC should not be amending its rules without public notice and comment by requiring new information to be collected on worksheets. A number of the questions appear unrelated to the application questions, and others require applicants to disclose commercially sensitive information regarding their investors and creditors which has not been required in the past.

9. For instance, Worksheet F on "Investor Insulation and Non-Party Influence over Applicant" seeks information on loan agreements such as whether the agreement (1) includes an unconditional promise by the applicant to pay on demand or on a specific date a sum certain; (2) contains a fixed or defined variable rate

of interest on the loan; and (3) does not prohibit the redemption of the loan by the applicant, or permit redemption at the option of the lender only. The FCC has never previously sought information on these matters and has not articulated why it now needs this material or what significance it has to the application process.

WHEREFORE, for the reasons above, the FCBA requests that: the Commission's rules require that application worksheets be filed by an applicant in the applicant's local public file and in the Commission's reference room, with an identification of the person or persons responsible for completing the worksheet and the date the worksheet was completed; and that the worksheets not request information that is unrelated to the FCC's processing of the underlying application.

Respectfully submitted,

**FEDERAL COMMUNICATIONS BAR ASSOCIATION**

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President



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